LUBI TAMAT

v.

SITORA SEPIAN & ANOR & TWO OTHERS

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[CIVIL APPEAL NO: 12-30-2004-III(II)]
21 JULY 2005

DAMAGES: *Personal injuries - Proof - Whether attributable to accident - Hip injuries - Appellant undergoing total hip replacement - Pain and suffering - Special damages - Loss of earning*

The appellant had suffered injuries and was admitted to the Serian Hospital when the bus she was travelling in met with an accident. At the trial, the learned Sessions Court judge made an award of RM16,000 for pain and suffering resulting from concussion, serious bleeding, laceration and injuries on the knees, but refused to make any award for loss of earning. The appellant contended that it was wrong of the trial judge to have disallowed loss of earning, and so appealed against that part of the decision *vide* ground 1 of her memorandum of appeal herein. The facts further showed that the trial judge had also disallowed the appellant's claim for damages for her hip injury on the ground that the medical report thereon did not show any nexus between the injury and the accident. Dissatisfied, the appellant also appealed against this part of the order. Before the learned appellate judge, the appellant argued that since the trial judge had awarded damages for pain and suffering caused by concussion, bleeding, laceration etc, it was inconsistent of her not to have awarded pain and suffering for the hip injury based on the same findings. It was further argued that the trial judge did not adequately consider her age of 52 years and the many agreed documents adduced in support of her claim.

Held (allowing appeal partly):

[1] Although the appellant only stayed one night in the Serian Hospital and was discharged, she suffered much pain thereafter in her hip area. It was unfortunate that all the doctors that she visited prior to her visit to a specialist at the Sarawak General Hospital in November 1998 (when the hip replacement operation was performed) did not inform her anything on her hip injury despite her complaint of pain. (p. 349 f)

[2] Exhibit P1, the discharge summary, is not merely a document evidencing that the appellant had undergone a hip replacement operation as pointed by the learned Sessions Court judge. Rather, that exhibit is an agreed

document - agreed as to authenticity and contents. Further, the words alleged in the statement "Alleged fall from bus Jan 98" ought not to be taken in isolation. It ought to be taken in its whole set of circumstance from the time of the appellant's discharge from Serian Hospital till her operation for a total hip replacement on 17 November 1998. Consequently, it would be sheer injustice to ignore the truth of the contents therein when there is evidence to show that the appellant was a passenger in the said bus which was involved in the said accident on 18 January 1998, which in turn started the whole chain of events which ultimately resulted in her undergoing a total hip replacement. (p. 350 c-g)

[3] As it was the hip injury rather than the injuries mentioned in ground 1 that incapacitated the appellant from working as she used to do prior to the accident, the claim for loss of earnings resulting from injuries referred to under ground 1 ought to be rejected. (p. 351 b)

[4] However, the appellant's appeal in regard to the hip injury is allowed for the amount which the learned Sessions Court judge stated, as follows; (i) RM30,000 as general damages for hip injury; (ii) RM4667 as special damages (medical fees and expenses); and (iii) RM21,600 for loss of earnings. (p. 351 c-e)

Case(s) referred to:
Jaafar Shaari & Anor v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***
Lim Ah Chi v. Tan Ah Mui & Anor [1969] 1 MLJ 215 ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1995] 3 MLJ 396 ***(refd)***

For the appellant/plaintiff - Raymond KF Kueh; M/s Raymond KF Kueh
For the respondents/defendants - Kilat Beriak, M/s Chew Jugah Wan Ullok & Co
For the 1st & 2nd third party - Desmond Sahathevan, M/s Battenberg & Talma

Reported by Rose Aziz

JUDGMENT

Lau Bee Lan J:
The court has considered the outline written-cum oral submissions of the learned counsel for the appellant/plaintiff and the 1st and 2nd respondents/1st and 2nd defendants, Mr. Raymond Kueh and Mr. Kilat Beriak respectively. The court's findings and evaluation include:

Ground 1 Of The Memorandum Of Appeal
The essence of the appellant/plaintiffs ('the appellant') grievance under ground 1 is the failure or omission of the learned Sessions Court judge to award the

plaintiff for loss of income after making a finding of fact that plaintiff should be awarded a sum of RM16,000 for plaintiffs pain and suffering resulting from the concussion and serious bleeding on forehead, nose, mount and ear, laceration and injuries on knees. Here, the learned counsel has urged the court to use its own understanding of conditions to arrive at a reasonable figure for the loss of income which was the approach adopted by the Federal Court in the Singapose case of *Lim Ah Chi v. Tan Ah Mui & Anor* [1969] 1 MLJ 215.

Mr Kilat submitted that no award should be made and the learned Sessions Court judge was correct in her finding because the appellant was only hospitalised for one night which showed that she could not have incurred loss of earings due to the said injuries.

I agree with Mr Kilat's point that PW1 (appellant) admitted that she was admitted to the Serian Hospital for only one night and this was confirmed by PW2, Dik a/k Inyang, appellant's daughter, who looked after he mother at the Serian Hospital for one night.

What is significant is that after the appellant's discharge from the said Hospital, she still experienced pain in her hip area and the pain did not subside despite the painkillers consumed by her. This was noted by the learned Sessions Court judge in her grounds of judgment in lines 2-8, p. 120 of the Record of Appeal.

> After her discharge from Serian General Hospital, she went to see the doctors in the General Hospital in both Serian and Saratok a few times. She also went to two private clinic in Saratok about the **pain on her hip**. She was **given pain killers but the pain got from bad to worse which she could not bear any more**, so in November 1998 her daughter, **PW2 brought her to see Dr Cyril Songan in 7th Mile who then referred her to the Sarawak General Hospital** ("the SGH") **on seeing that her condition was getting worse**.
>
> (Emphasis added)

This leads me to grounds 2, 3 and 4 of the memorandum of appeal which is overlapping and is best dealt together.

I will revert to ground 1 hereafter.

Grounds 2, 3, 4 of the Memorandum of Appeal

The primary contention of Mr. Raymond Kueh in respect of grounds 2, 3 and 4 is the failure of the learned sessions court judge to consider the discharge summary (exh. P1) which was an agreed document as to both authenticity and contents ie, "the contents in exh. P1 or the **discharge summary which states "Alleged fall from bus Jan '98 ..." was agreed to be true and correct by the parties** and not as stated by the learned Sessions Court judge as "discharge summary (exh. P1) merely evidenced that PW1 had undergone

a hip replacement without discussing the actual cause of the hip injury..” (Emphasis added). He further submitted that the learned Sessions Court judge was inconsistent in her finding of fact and argued that having found that a reasonable award ought to be given for the pain and suffering caused by concussion and bleeding, laceration etc, she should, based on the same set of facts, award pain and suffering for the hip injury sustained by the appellant, being a 52 years old woman. This, he submitted was especially substantiated by exh. P1, an agreed document which showed that the appellant had undergone a hip replacement operation.

Mr. Kilat submitted that the learned Sessions Court judge did not misdirect herself and had correctly disallowed the claim for damages for the hip injuries because the appellant “had not adduced any medical report or call medical doctor to support her claim that there is a nexus between the hip problem and the accident, in other words, that the accident was the cause of the injury”.

In approaching this matter, I have cautioned myself of the approach to be taken by an appellate court with respect to interference of a trial judge’s finding of facts which has been highlighted to the court in the various authorities cited by Mr. Kilat including, *Sivalingam a/l Periasamy v. Periasamy & Anor* [1995] 3 MLJ 396.

Perusing the relevant evidence pertaining to damages, I find that although the appellant only stayed one night in the Serian Hospital and was discharged, she suffered much pain thereafter in her hip area as noted by the learned Sessions Court judge in her grounds of judgment. It is indeed unfortunate that all the doctors that she visited prior to her visit to a specialist at the Sarawak General Hospital in November 1998 (before 17 November 1998 when the hip replacement operation was performed) did not inform her anything on her hip injury despite her complaint of pain and according to PW2, when the appellant was first discharged her condition was serious, she was in a wheelchair and was unable to walk and although upon first discharge, the doctor said the injury was external and there was no internal injury, her physical condition as per the evidence showed otherwise. That was why ultimately, the appellant had to undergo hip replacement operation. This is borne out in the evidence of PW2 at p. 40 of the Record of Appeal lines 6-15.

Q : Which doctor suggested hip replacement injury?

A : The specialist from the specialist clinic in SGH.

Q : Did the specialist in SGH inform you of your mother’s hip injury?

A : Yes, they did, they x-rayed my mother twice before the operation.

They told me it was necessary for my mother to go for the hip operation.

Q : Did they tell you why?

A : He said that if my mother was not operated, the wound in the hip would get worse and she might be paralyzed.

Q : Did they suggest any other method beside operation?

A : No.

Exhibit P1, the discharge summary is not merely a document evidencing that the appellant had undergone a hip replacement operation without discussing the actual cause of the hip injury, with respect, as pointed out by the learned Sessions Court judge, but exh. P1 is an agreed document, agreed as to authencity, and contents. The word alleged in the statement "Alleged fall from bus Jan 98" cannot be taken in isolation. It has to be viewed in its whole set of circumstances from the time of appellant's 1st discharge from Serian Hospital till her operation for a total hip replacement on 17 November 1998.

In *Jaafar bin Shaari & Anor (suing as administrators of the estate of Sharifah bte Ahmad, deceased) v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 SC, Poh Swee Chin FCJ, (as he then was) (delivery judgment on behalf of the Supreme Court) whilst touching on the point of interpretation of agreed bundles of documents at p. 522 stated:

> It is important enough for me to repeat that if there are express conditions or terms in regard to the inclusion of any document to the agreed bundle, **then the document would have to be dealt with according to and subject to such express conditions**. (Emphasis added)

In this instant case, as rightly pointed out by Mr. Raymond Kueh, exh. P1 was a document in Agreed Bundle 'B' which is the Bundle of Document, agreed as to authencity and contents. In my view, it would be sheer injustice to ignore the truth of the contents therein when there is evidence to show that the appellant was a passenger in the said bus which was involved in the said accident on 18 January 1998 and which started the whole chain of events which ultimately resulted in her undergoing a total hip replacement.

I agree with Mr. Kilat that the medical report dated 9 December 1998 at p. 155 of the Record of Appeal has not been marked as an exhibit, being only in Agreed Bundle of Documents 'C' which is agreed only as to authencity.

I observe that the learned Sessions Court judge had made some reference to it when she alluded to the statement "coupled this with an antalgic gait and avascular necrosis secondary to oesteoarthritis" but assuming if such reference

was unlawful, it does not detract from the fact that even if it was not considered there is ample evidence that the appellant's movement was restricted after her first discharge from Serian Hospital.

Reverting to ground 1, as it has been shown that it was the hip injury rather than the injuries mentioned in ground 1 that incapacitated the appellant from working as she used to do prior to the accident, the claim for loss of earnings resulting from injuries referred to under ground 1 ought to be rejected.

For the aforesaid reasons, I am constrained to reverse such part of the learned Sessions Court judge's decision and allow the appellant's appeal with costs to be taxed unless otherwise agreed for the amount which the learned Sessions Court judge stated should be granted if she is found to have erred with regard to her finding on the hip injury as follows:

(1) General damages for hip injury - RM30,000

(2) Special damages (medical fees and expenses) - RM4,667

(3) Loss of earnings - RM21,600

(4) Interest as awarded by the learned Sessions Court judge be maintained.